



In the Matter of:

STEVEN A. BALOG,

ARB CASE NO. 99-034

COMPLAINANT,

ALJ CASE NO. 95-TSC-9

v.

DATE: September 13, 2000

MED-SAFE SYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Marie A. Backes, Esq., *San Diego, California*

For the Respondent:

Robert C. Longstreth, Esq., *Gray Cary Ware & Freidenrich LLP, San Diego, California*

**DECISION AND ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT**

This matter arises under the employee protection provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994). Steven A. Balog filed a complaint alleging that Med-Safe Systems, Inc. (Med-Safe) violated the TSCA when it discharged him on February 9, 1995. Balog and Med-Safe agreed to settle the complaint and submitted a Confidential Agreement and Release of All Claims (Settlement Agreement) for approval. We have jurisdiction pursuant to 24 C.F.R. §24.8 (1999) and Secretary's Order No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996). We **APPROVE** the Settlement Agreement and **DISMISS** the complaint with prejudice.

I. BACKGROUND

A. Balog's termination by Med-Safe and resulting legal actions.

Med-Safe employed Steven Balog as a Senior Quality Assurance Engineer until his discharge on February 9, 1995. In this capacity Balog oversaw, among other things, the quality assurance of Med-Safe's only product, a "sharps collector." A sharps collector is designed to hold any discarded

razor blades, scalpels, syringes, needles, etc., used in hospitals, clinics and doctors' offices. Med-Safe warranted that its sharps collectors had a minimum wall thickness of .050 inches.

During the performance of his regular duties, Balog discovered that the sharps collectors did not have the warranted thickness. Balog claimed that Med-Safe discharged him because he disclosed this information internally to Med-Safe management and because he reported the wall thickness problem to Becton Dickinson, Med-Safe's only customer. Med-Safe claimed that it discharged Balog because he permitted the sharps collectors to be shipped when he knew they did not meet Med-Safe's warranted wall thickness.

On February 28, 1995, Balog filed a TSCA whistleblower complaint asking the Department of Labor to investigate Med-Safe's "flagrant disregard for regulatory laws, public safety, and employee rights that epitomize the illicit business situations that the whistleblower laws were enacted to prevent and punish." As relief for the alleged discrimination, Balog sought "abate[ment of] further violations; reinstate[ment] with back pay; reimbursement for attorney fees and related expenses; expunge[ment of] all insulting documents planted in my personnel file; and a letter of employee exoneration to employees, suppliers, and customers." The Department investigated Balog's complaint and made a preliminary determination that the TSCA did not apply; Balog requested a hearing before an Administrative Law Judge (ALJ).

Separately, Balog also filed a civil suit in California state court (Case No. 697054) based upon the same set of facts surrounding his discharge by Med-Safe. In that lawsuit, Balog named as defendants both Med-Safe and its customer, Becton Dickinson, based upon his belief that Becton Dickinson unlawfully had interfered with his employment and had conspired with Med-Safe to discharge him. Becton Dickinson had not been named in Balog's TSCA whistleblower complaint.

B. The Settlement Agreement.

Before commencing the hearing before the Labor Department ALJ in the TSCA complaint, the parties requested appointment of a settlement judge. After extensive discussion with the settlement judge, the parties agreed to a global settlement of Balog's claims against Med-Safe, including both the TSCA complaint and the state court action. Although Becton Dickinson was not signatory to the Settlement Agreement, the company was named in the Agreement as a "released party," *i.e.*, Balog's settlement with Med-Safe, by its terms, also resolved Balog's claims against Becton Dickinson.

As part of the Settlement Agreement, Med-Safe agreed to pay Balog \$47,401 for alleged lost wages, \$226,901 for alleged personal injury damages and \$34,099 for attorney's fees. In addition, the proposed Settlement Agreement included a non-disparagement clause, Paragraph 5:

Nondisparagement. The Parties hereto agree that they and their agents and attorneys will not make any voluntary statements, written, verbal, or cause or encourage others to make such statements, that defame or disparage the personal and/or business reputation, practices or conduct of the other Parties hereto or any of the Released Parties.

The parties presented the Settlement Agreement to the ALJ by letter dated April 19, 1996, with Med-Safe's attorney requesting "that we be sent copies of the documentation closing the file with respect to this matter." On April 24, 1996, the ALJ issued a Decision and Order Approving Settlement and Dismissing Matter with Prejudice (ALJ D&O) in which he reviewed and approved the Settlement, finding it to be adequate and not procured by duress. Although the parties had agreed that Balog would submit a motion to dismiss the TSCA claim *after* the Settlement Agreement was approved by the ALJ (and that Balog also would seek dismissal of the action pending in state court), the ALJ proceeded to dismiss with prejudice Balog's TSCA claim without waiting for such a motion from Balog. *See* ALJ D&O at 4.

In a further complication, the ALJ did not immediately forward the Settlement Agreement to the Labor Department for higher-level review, as required by the regulations then in effect. *See* 29 C.F.R. §24.6(a) (1996) (ALJs issued only recommended decisions which were then "forwarded, together with the record, to the Secretary of Labor for a final order.")^{1/} Technically, then, the ALJ's decision was merely a non-final recommended decision. Nonetheless, after the ALJ dismissed the TSCA claim, Balog received from Med-Safe the financial payments provided in the Settlement Agreement.

The ALJ's D&O finally was forwarded to this Board for review on January 12, 1999, nearly three years later. On January 26, 1999, we issued a Notice of Review and Order Establishing Briefing Schedule which stated:

Although styled as a final decision, and apparently treated by the ALJ and the parties as such, the Secretary's regulations in effect at the time provided that ALJs issued only recommended decisions with final decision making reserved to the Secretary. . . . Unfortunately, the ALJ's recommended order approving the settlement agreement was not forwarded for our consideration.

C. Balog's subsequent defamation action against Med-Safe.

On February 26, 1997, Balog filed another California state suit (Case No. 708381). This suit claimed, among other things, that Med-Safe had breached the nondisparagement provision of the Settlement Agreement (section IB, *supra*) when its Director of Worldwide Customer Service, John

^{1/} As of the date the ALJ issued his Decision and Order, all ALJ decisions automatically were reviewed by the Secretary of Labor. Soon afterward, this function was delegated to the Administrative Review Board pursuant to Secretary's Order 2-96. 61 Fed. Reg. 19,978 (May 3, 1996).

The automatic review provision that was in effect in 1996 was discontinued in 1998. Decisions issued by ALJs on or after March 11, 1998, became the final decisions of the Department unless affirmatively appealed by one or more of the parties. 43 Fed. Reg. 6614, 6620 (Feb. 9, 1998). The Settlement Agreement in the present case was signed, and the ALJ's Decision and Order was issued in 1996, long before the 1998 effective date of the changed procedures, and therefore was subject to automatic review by the Secretary or this Board.

Bethe, made allegedly disparaging statements about Balog to a research associate at a June 1996 national symposium dealing with safe syringe and needle disposal. Balog's suit claimed breach of the Settlement Agreement, intentional infliction of emotional distress, negligent infliction of emotional distress, and defamation. On February 13, 1998, the suit was dismissed because, among other reasons, the court found no triable issue of material fact that Bethe had made the statements with a state of mind arising from hatred or ill will.

II. STANDARD OF REVIEW

In reviewing the ALJ's recommended decision, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. §557(b) (1994). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. See *Berkman v. U.S. Coast Guard Academy*, ARB Case No. 98-056; ALJ Case Nos. 97-CAA-2, -9, Decision and Remand Order, slip op. at 15 (Feb. 29, 2000) and the material cited therein.

III. DISCUSSION

The TSCA requires that the Secretary must enter into or otherwise approve a settlement terminating the proceeding on a complaint filed under the Act. See 15 U.S.C. §2622(b)(2)(A); *Beliveau v. U.S. Dep't of Labor*, 170 F.3d 83 (1st Cir. 1999). As the Secretary's designee, the Board reviews settlement agreements to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. *Marcus v. U.S. Env'tl. Protection Agency*, ARB Case No. 99-027, ALJ Case Nos. 96-CAA-3, 96-CAA- 7, Order Approving Settlement and Dismissing Complaints, slip op. at 3 (Oct. 29, 1999) and the cases cited therein.

A. Med-Safe's Motion to Strike Balog's Reply Brief

Balog did not file a timely opposition to the ALJ's (recommended) approval of the Settlement Agreement, but only raised objections to the Agreement in a reply brief that was submitted in response to Med-Safe's statement in support of the Agreement.^{2/} Med-Safe requests that we strike Balog's reply brief on the grounds that it was not exclusively responsive to the issues raised in Med-Safe's initial brief. In response to Med-Safe's motion, Balog argues that his brief "is directly and exclusively responsive" to Med-Safe's primary argument that the ALJ correctly

^{2/} Apparently, Balog did not think to object to the recommended dismissal of his complaint until he received our Briefing Order. Even then Balog neglected to pursue his objection. Balog was given until February 24, 1999, to file his initial brief. On February 18, 1999, we granted Balog an extension of time, until March 16, 1999, to file his initial brief. On March 18, 1999, we granted Balog another extension, until March 29, 1999, to file his initial brief. When Balog did not file his initial brief by March 29, we denied any further extensions noting: "Complainant's counsel has been given a generous amount of time to submit a brief in this matter, but has failed to do so. Significantly, [Balog's counsel] Backes did not even attempt to request additional time for submitting her brief before the March 29, 1999 time limitation for submitting the brief had expired. We see no compelling reason to grant yetmore time to Complainant's counsel under these circumstances."

concluded that the settlement was fair, adequate and in compliance with the Department's regulations. We agree.

In its initial brief, Med-Safe argues that the ALJ's "conclusion that the settlement is adequate and not procured by duress is clearly correct" and that the ALJ "also correctly concluded that the settlement complies with the requirements of 29 C.F.R. § 18.9." Med-Safe Opening Brief at 1, 3. Balog's reply brief argues that the Board should not approve the Settlement Agreement under several theories, including:

1. The ALJ's Decision and Order approving the Settlement Agreement was procedurally flawed;
2. The Settlement Agreement was not fair and adequate; and
3. Becton Dickinson did not sign the Settlement Agreement.

These arguments go directly to the issues raised by Med-Safe, *i.e.*, the settlement was procedurally correct as well as adequate and fair. We therefore deny Med-Safe's motion to strike.

B. The merits of Balog's arguments in favor of repudiating the Settlement Agreement

In addition to the issues listed above, Balog also argues that the Settlement is "inoperative" under the Department's whistleblower regulations and he therefore should be permitted to proceed with his original TSCA complaint. In effect, Balog is arguing that he should be allowed to repudiate the Settlement Agreement based upon various alleged procedural or substantive deficiencies. We consider here the merits of each of Balog's alternative theories. Because we reject Balog's arguments on both legal and factual grounds, in the final section of this Discussion we review the terms of the Settlement Agreement itself.

1. The ALJ did not err in recommending dismissal of Balog's claim.

Balog argues that the dismissal of his claim was flawed because the ALJ did not issue an Order to Show Cause as required by 29 C.F.R. §24.6(e)(4)(ii) (1996).^{3/} He claims that he "lost his right to object within a reasonable time following the settlement." Balog Reply Brief at 2.

^{3/} When the ALJ considered the proposed Settlement Agreement, Labor Department regulations governing whistleblower cases required that the ALJ issue a "show cause" order before dismissing a claim:

In any case where a dismissal of a claim . . . is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim.

29 C.F.R. § 24.6(e)(4)(ii) (1996).

Balog's argument elevates form over substance. We fail to see how Balog was prejudiced in this instance inasmuch as he and Med-Safe voluntarily entered into a Settlement Agreement calling for dismissal and presented it to the ALJ. Thus, Balog was fully aware that his complaint would be dismissed, and cannot plausibly claim that the dismissal caught him off-guard, without an opportunity to object. When both parties are before the ALJ and jointly request dismissal an order to show cause is superfluous.

Balog also claims that the Settlement is void and unenforceable because the ALJ had no authority to issue a final order and did not forward his recommended order for review by the Board. For this reason he urges that we "deny Respondent's request that the terms of the settlement be approved." Balog Reply Brief at 1. This argument is without substance because the ALJ has forwarded his recommended decision for our review, albeit not promptly.

2. The binding effect of the Settlement Agreement.

Before this Board, Balog seeks to repudiate the Settlement Agreement and proceed with his TSCA complaint. Balog Reply Brief at 8. Under the facts before us, we deny this request.

Settlements are favored as a matter of policy since they resolve matters amicably without the expenditure of scarce resources. *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997). Holding parties to their settlement agreement until formally approved both promotes the economy of the process and enhances its credibility. "Employers would be less likely to enter into settlements if they thought a complainant could withdraw from it if he changed his mind or believed . . . he could obtain a greater relief by going to a hearing." *Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Order Rejecting in Part and Approving in Part Settlement between the Parties, slip op. at 16 (Nov. 14, 1989), *rev'd in part and aff'd in relevant part sub nom. Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1157 (5th Cir. 1991) (Secretary may hold complainant and company to their initial consent until she has had time to review the settlement).

There is some tension between the stability offered by holding the parties to their agreement until it is reviewed and the inequity which can occur when circumstances change before the agreement is reviewed. However, where the circumstances have not changed materially, we ordinarily hold the parties to the terms of their settlement agreement. *Compare Blanch v. Northeast Nuclear Energy Co.*, Case No. 90-ERA-11, Sec'y Final Order Approving Settlement and Dismissing Case (May 11, 1994) (complainant's unsubstantiated belief that respondent had violated the intent of the agreement not a basis to disapprove settlement) and *O'Sullivan v. Northeast Nuclear Energy Co.*, Case No. 90-ERA-35, Sec'y Order Approving Settlement and Dismissing Case (Dec. 10, 1990) (allegations that respondent violated the terms of the settlement and/or committed new violations may be basis for new complaint but not grounds to disapprove settlement) *with Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087; ALJ No. 88-ERA-33, slip op. at 18 (Nov. 10, 1997) (disapproving proposed settlement where breach of settlement agreement during period of review was found to have compromised complainant's statutorily protected interests).

Moreover, Balog has already elected to treat the ALJ's approval of the Settlement of his TSCA complaint as final, *e.g.*, he apparently considered the ALJ's Decision and Order as satisfying

his obligation to seek dismissal of his TSCA complaint;^{4/} he accepted the money Med-Safe paid under the terms of the Settlement Agreement;^{5/} and, he filed suit in state court claiming that Med-Safe had breached the Settlement Agreement. “Normally if a party enters into a settlement agreement knowingly and voluntarily, the agreement is treated as a binding contract and the party is precluded from raising the underlying claims.” *Arnold v. U.S.*, 816 F.2d 1306, 1309 (9th Cir. 1986) (citing *Alexander v. Gardner-Denver Co.*, 414 U.S. 36, 52 n.15 (1974)).

In this case, we do not perceive any material change in circumstances that would justify rejecting the Settlement Agreement entered into voluntarily by Balog and Med-Safe. To the extent that Balog believes that Med-Safe has breached the Agreement, he has adequate legal remedies available to him.^{6/}

3. Becton Dickinson is not a necessary party to the TSCA complaint.

Finally, Balog argues that the Settlement Agreement cannot be approved because Becton Dickinson, Med-Safe’s sole customer, never signed the Agreement.^{7/} However, Balog did not claim that Becton Dickinson violated the TSCA. His February 28, 1995 complaint dealt solely with Med-Safe’s actions.

The TSCA specifies that “the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have [violated the Act].” 15 U.S.C. §2622(b)(2)(A). Because Balog never named Becton Dickinson in his TSCA complaint, Becton Dickinson is not a necessary party to its settlement. *See* 29 C.F.R. §18.10 (a party against whom relief is sought is designated as a defendant or respondent); *see also* Fed. R. Civ. P. 19(a) (necessary party is one in whose absence complete relief cannot be accorded among those already named parties).^{8/} We therefore reject this argument.

^{4/} “Immediately after receipt of the payments set forth in paragraph 1, above, Balog shall cause to be filed Requests for Dismissal With Prejudice of the Department of Labor Proceeding and the Superior Court Action, and all claims and defendants therein, and shall take all appropriate steps to secure the dismissal with prejudice of those actions. Balog shall serve notices of such dismissals with prejudice on counsel for Med-Safe within 48 hours after receipt of the payments identified in paragraph 1, above.” Settlement Agreement ¶ 3.

^{5/} Ironically, even while attempting to repudiate the Settlement Agreement and proceed to litigate his original TSCA claim, Balog asserts that he need not return the money he received under the Settlement Agreement. Balog Reply Brief at 8-9.

^{6/} As discussed above, Balog has exercised these legal remedies.

^{7/} “This error is fatal to the settlement as it violates the essential requirement of 29 C.F.R. 18.9(e)(9), which regulation expressly requires that any settlement agreement ‘*shall* be written and signed by *all parties.*’” Balog Reply Brief at 2 (italics in original).

^{8/} Balog argues that the Settlement Agreement is unfair because Becton Dickinson obtained all the benefits of being a “released party” yet suffered no liability. He claims that “Becton Dickinson deliberately (continued...)

C. The Settlement Agreement is fair, adequate and reasonable.

Overall, we find the Agreement to be a fair, adequate and reasonable settlement of Balog's TSCA complaint.^{2/}

Review of the Settlement Agreement discloses that it may encompass settlement of matters under laws other than the TSCA. *See* Settlement Agreement ¶¶ 3, 7. Our authority to review this Settlement Agreement is limited to the statutes within our jurisdiction and is defined by the applicable statute. *Pawlowski v. Hewlett-Packard Co.*, ARB Case No. 99-089; ALJ Case No. 97-TSC-3, Final Ord. Approving Settlement and Dismissing The Complaint With Prejudice, slip op. at 2 (May 5, 2000). We have restricted our review of the Settlement Agreement to determining whether the terms of the Agreement fairly, adequately and reasonably settle Balog's allegation that Med-Safe violated the TSCA.

Paragraph 16 of the Settlement Agreement provides that the agreement will be governed by the laws of the state of California. We construe this provision to except the authority of the Administrative Review Board and any Federal court, which shall be governed in all respects by the law and regulations of the United States. *Nason v. Maine Yankee Atomic Power Co.*, ARB Case No. 99-091; ALJ Case No. 97-ERA-37, Final Order Approving Settlement and Dismissing Complaint, slip op. at 2 (Mar. 20, 1998); *see also* 15 U.S.C. § 2622(c), (d).

Thus construed, we find the Settlement Agreement to be a fair, adequate and reasonable settlement of Balog's TSCA complaint.

^{8/}(...continued)

avoided signing the Settlement Agreement and thereby committed a fraud on the ARB and Complainant, and the U.S. Department of Labor." Balog Reply Brief at 4. This is essentially a claim that Becton Dickinson committed a fraud upon the court. Fraud upon the court must involve an unconscionable plan or scheme designed to improperly influence the court in its decision. *Abatti v. Comm'r*, 859 F.2d 115, 118 (9th Cir. 1988). To show fraud upon the court, the complaining party must establish that the alleged misconduct affected the integrity of the judicial process, either because the court itself was defrauded or because the misconduct was perpetrated by officers of the court. *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989). Balog has not established either of these elements.

Having fully participated through counsel in the negotiations leading up to the drafting of the Settlement Agreement and its execution, Balog cannot now complain that the Agreement was imperfectly drafted or executed.

^{2/} Having received over \$300,000 for lost wages, other damages and attorney's fees, Balog is unpersuasive when he argues that "[h]e has essentially received nothing by signing the Settlement Agreement." Balog Reply Brief at 7. The fact that the settlement proceeds may be inadequate after having been reduced by expenses related to the unsuccessful defamation suit is no basis to disapprove the settlement. *Worthy v. McKesson Corp.*, 756 F.2d 1370, 1373 (8th Cir. 1985) (party to a voluntary settlement agreement cannot avoid the agreement simply because it ultimately proves inadequate).

IV. CONCLUSION

We **APPROVE** the Settlement Agreement and **DISMISS** Balog's TSCA complaint with prejudice.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member